Supreme Court, U.S.
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No. 95-145

In The

Supreme Court of the United States

October Term, 1995

TOWN OF WEST BOYLSTON, CHARLES GREENOUGH and KATHLEEN FOREMAN,

Cross-Petitioners,

vs.

ELIOT R. FREEMAN,

Cross-Respondent.

Conditional Cross-Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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13 pp

QUESTION PRESENTED

Did the Supreme Judicial Court of the Commonwealth of Massachusetts err in failing to address and determine the issue of whether Petitioner possessed a constitutionally protected property right in subdivision plan approval during the period alleged in his complaint pursuant to 42 U.S.C. § 1983?

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OPINION BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts (Petitioner's App., A-1 - A-21) is reported at 419 Mass. 548 (1995).

STATEMENT OF JURISDICTION

On February 24, 1995, the Supreme Judicial Court of the Commonwealth of Massachusetts entered a judgment in favor of the Cross-Petitioners/Respondents [hereinafter "Respondents"], reversing judgments of the Superior Court of Worcester County entered on December 18, 1992. On May 19, 1995, this Court granted an extension of time for filing a petition for a writ of certiorari until July 24, 1995. Cross-Respondent/Petitioner [hereinafter "Petitioner"] filed his petition for a writ of certiorari on July 24, 1995. Respondents received a copy of the petition on July 24, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) and Rule 12.3 of the Rules of the Supreme Court of the United States and is conditional upon this Court's grant of Petitioner's petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> Nor shall any state deprive any person of life, liberty or property without due process of law. . . .

U.S. Const. amend. XIV, § 1.

The Civil Rights Act of 1964, as amended, and codified at 42 U.S.C. §1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (1994).

The Subdivision Control Law of the Commonwealth of Massachusetts [hereinafter "SCL"] is found at Mass. Gen. L. ch. 41, §§ 81K-81GG (1994), inclusive. Sections 81M, 81O, 81Q, 81R, 81T, 81U, 81W, and 81BB are reprinted in the Respondents' Appendix A to their Brief in Opposition to Petition for Writ of Certiorari, *Freeman v. Town of West Boylston, et al.*, (United States Supreme Court) (No. 95-145) [hereinafter "Respondents' Brief in Opposition"].

STATEMENT OF THE CASE

The Cross-Petitioners/Respondents rely upon, and incorporate by reference hereto, the Statement of the Case presented in Respondents' Brief in Opposition.

In addition, the issue sought to be raised in this conditional cross-petition, namely, Petitioner's lack of a constitutionally protected property right, was raised at both the trial level and on appeal before the Massachusetts Supreme Judicial Court. The Respondents argued as early as on motion for summary judgment

that Petitioner was unable to meet his burden of establishing a "legitimate entitlement" to subdivision plan approval pursuant to Mass. Gen. L. ch. 41, § 81K *et seq.*, an essential element of his case. (Supp. R. 8-9, 25-26). The Respondents' Motion was denied on March 6, 1991. (R. 65).

This argument was also developed through trial examination (Trial Transcript 237-38) [hereinafter "T.T."], set forth by motion for directed verdict (Respondents' App. 11a-19a), and at length during arguments on motions for directed verdict (T.T. 757, 775-78, 796-97, 800) and motions for judgment notwithstanding the verdict (Supp. R. 32, n.2), and, indeed acknowledged in the Superior Court's instructions to the jury. (Respondents' App. 8a-10a).

In their motion for directed verdict, Respondents stated, in pertinent part:

> [T]he plaintiff . . . has established *neither a property right* nor evidence of the type of oppressive abuse of power which could arguably implicate the due process clause. *The plaintiff has failed to establish a property right* sufficiently definite to trigger the due process clause *since he had no right to an approval of his plan until* the drainage aspect was approved *after the second public hearing* in May, 1988. Prior to that time, the drainage plan he submitted did not *comply with the Board's regulations* and he had no right to subdivide his property *until* he satisfied the Board on that issue and *after a public hearing was held as required by law and until the abutter's appeal was disposed of.*

(Respondents' App. 12a) (emphasis added).

The Superior Court denied the motions for directed verdict, and subsequently, on October 22, 1992, denied the motions for judgment notwithstanding the verdict. (R. 11). Respondents appealed on November 13, 1992 to the Massachusetts Appeals Court (R. 11; 125), and the case was transferred *sua sponte* to the Massachusetts Supreme Judicial Court.

On appeal, Respondents argued both in their brief and before the Supreme Judicial Court that Petitioner had no legitimate entitlement to approval of his subdivision plan prior to April, 1989, and thus no constitutionally protected property right, prior to that date.[1] (Petitioner's App. A-13 n.14; Brief of the Defendants-Appellants at 28-43, *Freeman v. Town of West Boylston, et al.*, 419 Mass. 548 (1995) (No. SJC-06645)). The Supreme Judicial Court did not decide the issue, however, and presumed for purposes of its decision that Petitioner had a "property right in approval of the definitive plan." (Petitioner's App. A-13). The Supreme Judicial Court ultimately found in favor of the Respondents, and Petitioner filed the present petition for a writ of certiorari.

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1. This date is significant because the Respondents' conduct complained of by Petitioner predates April, 1989. (*See* R. 35-55, Amended Complaint, filed February 2, 1989).

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

I.

IN THE EVENT THE COURT GRANTS THE PETITION FOR WRIT OF CERTIORARI, JUST RESOLUTION OF THE ISSUES PRESENTED IN THE PETITION REQUIRE THE COURT TO DETERMINE WHETHER UNDER STATE LAW PETITIONER POSSESSED, DURING THE RELEVANT PERIOD, A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT IN SUBDIVISION PLAN APPROVAL IN THE CONTEXT OF PETITIONER'S SUBSTANTIVE DUE PROCESS CLAIM UNDER 42 U.S.C. § 1983.

Should this Court grant the petition for a writ of certiorari in this case, it will be called upon to review whether, on the facts as summarized by the Massachusetts Supreme Judicial Court, Respondents' conduct in reviewing and ultimately approving with conditions, Petitioner's definitive subdivision plan, constituted a violation of Petitioner's substantive due process rights in the context of 42 U.S.C. § 1983. It is indisputable that for purposes of Petitioner's § 1983 claim, he must demonstrate that he was deprived of a constitutionally protected property right. *Chongris v. Board of Appeals of Andover,* 811 F.2d 36, 40 (1st Cir. 1987); *Roy v. Augusta,* 712 F.2d 1517, 1522 (1st Cir. 1983) (both cases *citing Parratt v. Taylor,* 451 U.S. 527, 536-37 (1981)); *see also, e.g., Zahra v. Town of Southold,* 48 F.3d 674, 680 (2d Cir. 1995).

The Supreme Judicial Court presumed in its analysis that the Petitioner possessed a constitutionally protected property right in approval of his definitive subdivision plan. (Petitioner's App. A-

13).[2] The Supreme Judicial Court then found that the Respondents' conduct did not rise to the applicable level of "arbitrariness and caprice" to constitute a substantive due process violation, without addressing the threshold question of whether Petitioner even possessed a property right sufficient to be entitled to constitutional protection. (Petitioner's App. A-13).

Despite the Supreme Judicial Court's failure to determine the property right issue, equitable considerations warrant that this Court address the question of whether Petitioner in fact possessed a constitutionally protected right to subdivision plan approval. Otherwise, application by this Court of a different threshold substantive due process standard than applied by the Supreme Judicial Court could result in a manifestly unjust imposition of substantial monetary damages upon a public entity and public officials who have caused no constitutional deprivation.

Petitioner's asserted "property right" is his alleged "right to develop his property" (T.T. 898). It is well-settled, however, that a landowner's right to use, enjoy, and develop his or her property is subject to reasonable governmental regulations to protect legitimate governmental interests, such as the public health, safety, and welfare. *See, e.g., Consolidated Cigar Corp. v. Department of Public Health,* 372 Mass. 844, 851 (1977). In fact, the Subdivision Control Law (SCL) itself demonstrates a

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2. Although the Respondents repeatedly argued before the lower courts that Petitioner failed to demonstrate the requisite constitutionally protected property right to prevail on his substantive due process claim (*see* Statement of the Case, *supra*), the Supreme Judicial Court erroneously concluded that Respondents had waived the property right argument discussed above, in its "highly detailed guise." (Petitioner's App. A-14 n.14). For the reasons set forth at Section III. of the Respondents' Brief in Opposition, the Supreme Judicial Court was incorrect as a matter of law in this regard, and the issue was adequately preserved for appeal. Respondents, therefore, are not precluded from challenging the existence of a constitutionally protected property right before this Court.

legislative balance between legitimate government interests in regulating the subdivision of land with the rights of a landowner. Under the SCL, local planning boards must review and approve plans for the subdivision of land prior to the commencement of development. *See* Mass. Gen. L. ch. 41, § 81K, *et seq.* There is *no* absolute entitlement to subdivision plan approval, but rather, each plan must be found to conform with the SCL and the rules and regulations of the local planning board. *See* Mass. Gen. L. ch. 41, § 81U. (Respondents' App. 4a-5a).

In the substantive due process context, a determination of whether or not a landowner possesses a "legitimate claim of entitlement" to subdivision plan approval is essential to establishing a constitutionally protected property right. *O'Neill v. Town of Nantucket,* 545 F. Supp. 449, 452 (D. Mass. 1982), *aff'd.,* 711 F.2d 469 (1st Cir. 1983); *see also, Perry v. Sinderman*, 408 U.S. 593, 603 (1972) ("mere subjective 'expectancy' " insufficient to warrant due process protection); *Roth v. Board of Regents*, 408 U.S. 564, 577 (1972) ("To have a property interest . . . a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."). Such a determination must be made in reference to the state SCL. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 430 (1982); *Chongris v. Board of Appeals of Andover,* 811 F.2d 36, 43 (1st Cir. 1987) (it is "a black-letter certainty that property rights, while protected by the Federal Constitution, are creatures of state law"); *see also, Roth,* 408 U.S. at 577. Moreover, this question is one of *federal* law, and thus appropriate for resolution by this Court:

> [a]lthough the underlying substantive interest is created by "an independent source such as state law," federal constitutional law determines whether that interest rises to the

> level of a "legitimate claim of entitlement" protected by the Due Process Clause.

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) (citations omitted).

In this case, for the reasons set forth in footnote 16 of Respondents' Brief in Opposition, Petitioner did not possess a legitimate entitlement to plan approval under the applicable state law, and thus no protected property right. Without such a protected property right, Respondents cannot be held liable for any substantive due process violations in this case, regardless of the standard of review used to measure the Respondents' conduct.

CONCLUSION

For the foregoing reasons, the conditional cross-petition for writ of certiorari should be granted.

Respectfully submitted,

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